

Appendix F – Information Services Board Protest Appeal Procedures

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Introduction

A bidder for an Information Technology (IT) acquisition that falls within the statutory authority of the Information Services Board (ISB) may file a protest with the issuing agency following the acquisition process. If the bidder is not satisfied with the agency's decision, it may file an appeal of the agency's decision. If the appeal is made to the ISB, the ISB Chair will notify the parties to an appeal whether these procedures will be used as written or modified based on the circumstances of the appeal before the ISB.

Agencies should consult with their Department of Information Services (DIS) Senior Technology Management Consultant for advice and assistance during the appeal process.

Procedures

1. General. A bidder for an IT acquisition that falls within the statutory authority of the ISB may file a protest with an agency following the acquisition process within five business days after the bidder has had a debriefing conference. Any issues raised by the protesting party after the five-day period will not be considered. The grounds for the protest are set out in the *ISB Information Technology Investment Standards*. Protests may be made on only these grounds:

- Arithmetic errors were made in computing the score,
- The agency failed to follow procedures established in the solicitation document, the *IT Investment Policy*, the *IT Investment Standards*, or applicable state or federal laws or regulations, or
- There was bias, discrimination, or conflict of interest on the part of an evaluator.

Following an agency's final protest decision, to the ISB within five business days after receiving notification of the agency's final decision. If the appeal is made to the ISB, the ISB Chair establishes the process for each appeal presented and may use these procedures or modify them to fit the circumstances of a particular appeal. When an appeal is presented, the ISB Chair will notify the parties whether the procedures will be

used as written or modified based on the circumstances of the appeal before the ISB. Agencies should consult with their DIS Senior Technology Management Consultant for advice and assistance during the appeal process.

2. Appeal Panel. The Chair of the ISB will appoint an Appeal Panel to review the appeal and make recommendations to the ISB Chair to resolve the appeal. No member of the Appeal Panel may have a financial interest in or potential conflict related to the outcome of the appeal process. The ISB Chair will appoint one of the Appeal Panel members to serve as the Appeal Panel Chair.

3. Appeal Panel Chair. The Appeal Panel Chair is responsible for implementing the procedures used during the appeal process, drafting the Appeal Panel's recommendation, and forwarding the recommendation to the ISB Chair. The Appeal Panel Chair has the authority to make exceptions to these procedures. All exceptions will be documented in writing.

4. Appeal Panel Documentation.

a. Number of Copies. Each of the parties to the appeal or their designated representative will provide a minimum of six copies of their written position summary to the DIS Deputy Director of the Management and Oversight of Strategic Technologies Division (MOSTD) for consideration by the Appeal Panel not later than five business days before the date of the Appeal Panel proceeding. In addition, each party will provide a copy of such documents to the other party on the same day.

b. Format of Documents. Each party to an appeal will submit a written protest, stating the basis of its appeal position, using the scope and format guidelines set out in the *IT Investment Standards* as a guide. A written protest must contain the facts and arguments upon which the protest is based and must be signed by a person authorized to bind the vendor to a contractual relationship. At a minimum, this must include:

- The name of the protesting vendor, its mailing address and phone number, and the name of the individual responsible for submission of the protest.
- Information about the acquisition and the acquisition method and name of the issuing agency.
- A specific and complete statement of the agency action(s) protested.
- A specific reference to the grounds for the protest.
- A description of the relief or corrective action requested.
- A copy of the issuing agency's written decision on the protest.

c. Written Position Summary Format. The written summary is limited to 25 double-spaced pages, excluding attachments. All attachments to the written summary will be referenced in the summary and indexed. Each written summary will be submitted in a three-ring binder, marked with the name of the party submitting the written summary, an index in the front with references to the pages of the written summary, and an index of the attachments. Attachments will be numbered 1, 2, 3, etc. The written summary may

include attachments such as: declarations from parties having direct knowledge of the contract bid process, documents related to the contract process, etc.

d. Confidential Documents. If an attachment is asserted to be confidential, or contains proprietary information, then the entire attachment will be separated by a piece of colored paper, numbered C1, C2, C3, etc., and the individual pages deemed to be confidential or proprietary will be marked. Attachments containing information marked confidential or proprietary must also be marked in the index.

f. Appeal Panel Transcript. DIS will arrange for a transcript of the Appeal Panel proceedings.

5. Notices. The DIS Deputy Director of MOSTD is responsible for preparing Appeal Panel notices to inform each party of the date, time, and location of the proceeding and the procedures that will be used during the proceeding.

6. Appeal Panel Presentations. The Appeal Panel Chair will begin the proceeding by communicating any ground rules pertinent to the proceeding and will ask the parties if there are any concerns or questions regarding the Appeal Panel procedures. Additionally, the Appeal Panel Chair will inform the parties of the next steps that the panel will take once the panel proceedings are concluded. Each party will have 20 minutes to make its initial presentation, and 10 minutes of rebuttal time following the other party's presentation. After each presentation, the Appeal Panel may ask questions of each party for an unlimited amount of time. Any questions or concerns regarding the procedures during the proceeding will be addressed to the Appeal Panel Chair.

7. Appeal Panel Remedies. The Appeal Panel has the ability to hear the concerns of each party related to an appeal following the acquisition and protest process; such concerns will be limited to the issues raised in the initial protest in accordance with the permitted grounds for protest listed in the *Information Technology Investment Standards*. The Appeal Panel does not have the authority to award contracts or to disclose information deemed confidential by a party. The Appeal Panel makes recommendations to the ISB Chair, who is authorized to decide the appeal.

8. Conflict of Interest/Confidentiality. All Appeal Panel members and ISB staff involved in the appeal process will be required to sign a document certifying their lack of conflict of interest and understanding regarding the treatment of confidential or proprietary information submitted for consideration by the Appeal Panel. See Appendix F-1, Sample Confidentiality Memorandum and Certification of Confidentiality.

9. Ex Parte Communications. Ex Parte communications are prohibited during the appeal process. Concerns regarding ex parte communications will be addressed first to the DIS Deputy Director of MOSTD, then to the Appeal Panel Chair.

10. Final Decision. Once the recommendation of the Appeal Panel is forwarded to the ISB Chair, the ISB Chair will make a final decision. Certified copies of the final decision will be sent to each party, the DIS Deputy Director of MOSTD, and the members of the Appeal Panel.

11. Competitive Contracting. If the protest to the ISB involves a contracting process that falls within the Competitive Contracting rules under chapter 41.06 RCW and chapter 236-51 Washington Administrative Code, the complaint must first be made to the agency, which will investigate and render a preliminary decision. The preliminary decision is then forwarded to the ISB for review within five business days after receipt of the preliminary decision. The ISB Chair will appoint an Appeal Panel, which will render its findings and recommended decision to the ISB Chair, and the ISB Chair will send a final decision to the agency. The agency will adopt the ISB's final decision as the agency's final decision. The final agency decision may then be appealed to the administrative law judge as an administrative proceeding as set out in WAC 236-51. In protests involving competitive contracting, the ISB may expand the scope of the appeal to include an appeal of the solicitation and award requirements set out in WAC 236-51.

12. World Trade Organization (WTO) Government Procurement Agreement. If the protest involves a contract that falls within the WTO procurement requirements, the Appeal Panel and ISB Chair will use the guidelines published in the WTO Government Procurement Agreement in addition to these procedures to resolve the protest.

Appendix F-1

SAMPLE MEMORANDUM OF CONFIDENTIALITY

To: ISB Appeal Panel Members
From: *(Insert Name)*
Date: *(Insert Date)*
Re: Appeal of *(Insert acquisition name and number)*

Thank you for participating as a member of the Information Services Board (ISB) Appeal Panel for the review of the *(insert acquisition name)* appeal. To help ensure that the appeal review is accomplished in a fair and unbiased manner, and to avoid any appearance of bias, please observe the following guidelines.

Confidentiality. Please maintain the confidentiality of this appeal process at all times. Do not discuss material you have reviewed with anyone outside of the Appeal Panel and its staff. Safeguard and keep confidential all documents provided to you as part of the appeal process. Do not disclose the documentation received as part of the appeal review to any person (except as appropriate with a co-member of the Appeal Panel or DIS appeal staff) until after the ISB Chair renders a final decision.

Materials marked by the parties as “proprietary” or “confidential” shall not be disclosed, except by DIS, and then, only in accordance with the Public Disclosure Act, Chapter 42.17 RCW, and WAC 143-06.

If you are contacted for information regarding this appeal, please direct the requestor to *(insert name)*, who is the point of contact on questions regarding this appeal. In addition, let *(insert name)* know who contacted you.

During the appeal process, you will be required to secure all documentation provided to you when not in use. Do so by locking the documentation in a secure location in your office or return the documentation to *(insert name)*.

Conflict of Interest. During the appeal process, if you discover that you have, or believe you may have, a potential conflict of interest that you did not realize previously, please immediately notify *(insert name)*. You must have no personal or business interests in the outcome of this appeal process which would unfairly prejudice you either in favor of or against a particular party or inhibit your ability to impartially review the documentation.

Documentation. All documentation provided to your for review, and any extra sheets of paper used in the appeal process should be turned in to *(insert name)* after the final decision is rendered by the ISB Chair.

Questions. If you have any questions regarding the appeal process, or if you need clarification of any document, please direct your questions to:

Name:

Address:

Telephone:

FAX:

E-mail:

If you are able to make the commitment of time and have no conflicts with any of the requirements noted above, please sign the attached *Certification – Conflict of Interest and Confidentiality* document, and return a copy via mail or fax to *(insert name)* using the contact information above no later than *(insert date)*.

Thank you for your time and effort in assisting in the appeal process.

Appendix F-2

SAMPLE CERTIFICATION CONFLICT OF INTEREST AND CONFIDENTIALITY

Information Services Board
(*Insert Name*) Protest Appeal
(*Insert Date*)

This certifies that I have read and understand the conflict of interest and confidentiality Memorandum dated (*insert date*).

I certify that I did not participate in the preparation or submission of any bid, response, proposal, protest, or protest decision submitted under or resulting from (*insert acquisition number*) for the acquisition of (*insert subject*).

I certify that I am not an employee, consultant, officer, director or trustee of, nor do I have any financial interest in, any organization, institution, business, or other entity which has submitted a protest to be reviewed by me as a member of the Information Services Board Appeal Panel during this appeal process. To the best of my knowledge, there are no conditions that present a conflict of interest.

I certify that I am not aware of any issue which would affect my ability to participate on the Appeal Panel in an unbiased and objective manner, or which would place me in a position of real or apparent conflict of interest between my responsibilities as a member of the Appeal Panel and other interests.

I fully understand the confidential nature of the materials that may be contained in the appeal documentation and review related thereto, and agree to the conflict of interest and confidentiality guidelines presented in the Memorandum, which has been provided to me by (*insert name*).

Signature

Date

Print name